

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

**Plaintiff
(Appellant/Responding Party)**

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

**Defendants
(Respondents/Moving Parties)**

**FACTUM OF THE RESPONDENT/MOVING PARTY, BRANDON MOYSE
MOTION TO QUASH APPEAL**

September 9, 2015

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PART I. OVERVIEW

1. The appellant, Catalyst Capital Group Inc. ("Catalyst") has appealed the interlocutory order of Justice Glustein dismissing its motion to have the respondent, its former junior employee, Brandon Moyse, found in contempt, to this court. In 2013, the Court of Appeal for Ontario held that an order dismissing a motion for contempt is an interlocutory order, not a final order. An appeal of an interlocutory order lies, with leave, to the Divisional Court. The Court of Appeal does not have jurisdiction to hear Catalyst's appeal and it should be quashed.

PART II. FACTS

A. The underlying action and orders

2. This action arises out of Mr. Moyse's departure from his employment at Catalyst to begin working for the co-defendant, West Face Capital Inc. ("West Face"). Shortly after Mr. Moyse announced his intention to begin working at West Face, Catalyst commenced this action and brought a motion seeking injunctive relief.

3. On July 16, 2014, the parties attended before Justice Firestone on Catalyst's motion for injunctive relief. Following discussions, the parties consented to an order (the "Firestone Order"). The Firestone Order included a number of terms, including terms which required Mr. Moyse to:

- (a) preserve and maintain all relevant records in his power, possession or control; and

- (b) turn over all his personal computer and electronic devices for the taking of a forensic image of the data served on his devices, to be conducted by a professional firm as agreed to between the parties.¹

4. In January, 2015, Catalyst brought a motion seeking broad-ranging relief with respect to West Face. By the return of the motion before Justice Glustein, Catalyst had narrowed the relief sought against West Face to requests for:

- (a) an order prohibiting the defendant West Face Capital Inc. ("West Face") from voting its 35% share interest in WIND Mobile pending a determination of the issues raised in the action (the "Voting Injunction"); and
- (b) an order authorizing an Independent Supervising Solicitor to create and review forensic images of the corporate servers of West Face and the electronic devices used by five individuals at West Face at the defendants' expense (the "Imaging Order").²

5. In February, 2015, Catalyst amended its notice of motion to seek relief with respect to Mr. Moyse. It sought an order declaring that Mr. Moyse was in contempt of the Firestone Order and that Mr. Moyse be committed to jail (the "Contempt Order").³

6. Catalyst alleged that Mr. Moyse committed the following contemptuous acts:

- (a) he deleted his personal browsing history immediately prior to turning his personal computer for imaging; and
- (b) he allegedly bought and used software to "scrub" files from his personal computer prior to delivering it.⁴

¹ Order of Justice Firestone, dated July 16, 2014, Moving Party's Motion Record ("MR") Tab 6, p. 61.

² Catalyst Notice of Motion, MR Tab 4, p. 24; Reasons for decision of Justice Glustein ("Reasons"), MR Tab 3, p. 10, para. 1.

³ Catalyst Amended Notice of Motion, MR Tab 5, p. 41, s. (c.1)-(c.2).

⁴ Reasons, MR Tab 3, p. 18, para. 61.

7. The parties argued Catalyst's motion for the Voting Injunction, Imaging Order, and Contempt Order before Justice Glustein on July 2, 2015.

8. On July 7, 2015, Justice Glustein dismissed Catalyst's motion in its entirety.⁵

9. With respect to the portion of the motion seeking the Contempt Order, Justice Glustein held that there was no evidence to establish beyond a reasonable doubt that Mr. Moyse:

(a) deleted relevant information as a result of deleting his personal browsing history;⁶ or

(b) scrubbed relevant files from his personal computer prior to delivering it.⁷

10. On July 22, 2015, Catalyst served a notice of appeal to the Court of Appeal from Justice Glustein's order.⁸

PART III. ISSUE AND ARGUMENT

11. There is one issue on this motion: does the Court of Appeal have jurisdiction to hear Catalyst's appeal? Mr. Moyse respectfully submits it does not, and the appeal should be quashed.

12. In 2013, in *Simmonds v. Simmonds*, the Court of Appeal held that an order dismissing a motion for a contempt order is interlocutory and that an appeal, therefore, does not lie to the Court of Appeal.⁹ The appellant in *Simmonds* relied on the Superior Court's

⁵ Order of Justice Glustein, dated July 7, 2015, MR Tab 2, p. 7.

⁶ Reasons, MR Tab 3, pp. 19-20, paras. 69-79.

⁷ Reasons, MR Tab 3, pp. 21-22, paras. 80-87.

⁸ Notice of Appeal, dated July 22, 2015, MR Tab 7, p. 65.

⁹ *Simmonds v. Simmonds*, 2013 ONCA 479, Moving Party's Book of Authorities ("BOA") Tab 1 [*Simmonds*].

decision in *Pimiskern v. Brophay*¹⁰ to argue that an order dismissing a motion for contempt is a final order. The court agreed with the respondent and moving party, and expressly rejected the reasoning in *Pimiskern*:

The appellant appeals the January 22, 2013 order of the motion judge dismissing his motion for a finding that the respondent was in contempt of court because she had failed to comply with the August 3, 2012 order of Mossip J. requiring her to provide specified disclosure in respect of her income loss claim arising from the motor vehicle accident that occurred in 2004.

The motion judge reviewed the materials that had been provided and found that the respondent had complied with the order of Mossip J. and provided all relevant disclosure.

The appellant relies on *Pimiskern v. Brophay* to argue that an order dismissing a motion for contempt is a final order.

The respondent concedes that an order finding contempt is a final order but argues that because the motion judge dismissed the motion for contempt, the motion judge's order is interlocutory and not binding on the trial judge, and that an appeal accordingly does not lie to this court.

We agree with the respondent and reject the conclusion reached in *Pimiskern*.

This appeal is accordingly dismissed for lack of jurisdiction. Costs are fixed in the amount of \$3,500 all inclusive. [Citations omitted.]¹¹

13. Just as in *Simmonds*, Catalyst's appeal is from an order dismissing a motion for a contempt order, which is an interlocutory order. The appeal with respect to Mr. Moyse should be dismissed for lack of jurisdiction. The *Courts of Justice Act* provides for the Court of Appeal's jurisdiction:

6. (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

¹⁰ *Pimiskern v. Brophay*, 2013 ONSC 572, BOA Tab 2.

¹¹ *Simmonds*, *supra* note 9, BOA Tab 1 at paras. 4-5.

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court.¹²

14. An appeal of an interlocutory order of a judge lies to the Divisional Court, and requires leave:

19. (1) An appeal lies to the Divisional Court from,

...

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;¹³

15. Rule 62.02 of the *Rules of Civil Procedure* provides that:

62.02 (1) Leave to appeal to the Divisional Court under clause 19 (1) (b) of the Courts of Justice Act shall be obtained from a judge other than the judge who made the interlocutory order.¹⁴

16. Catalyst should have sought leave to appeal the Contempt Order to the Divisional Court. Instead, it brought its appeal before this court, despite being put on notice by counsel for Mr. Moyse on the applicable provisions of the *Rules of Civil Procedure* and the *Courts of Justice Act* and the authority of this court's precedent in *Simmonds*.¹⁵

PART IV. ORDER SOUGHT

17. Mr. Moyse asks that Catalyst's appeal be quashed, and that he be awarded his costs of this motion on a substantial indemnity basis.

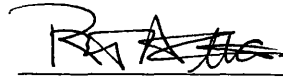
¹² *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1).

¹³ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 19(1).

¹⁴ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 62.02(1).

¹⁵ Letter from K. Borg-Olivier to A. Winton, July 24, 2015, Exhibit "A" to the Affidavit of Janice Patterson, sworn September 9, 2015, MR Tab 8A, p. 82.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF SEPTEMBER, 2015

A handwritten signature in black ink, appearing to read 'R Centa', is written over a horizontal line.

Robert Centa / Kristian Borg-Olivier / Denise Cooney

Paliare Roland Rosenberg Rothstein LLP
Lawyers for the Defendant Brandon Moyse

TAB A

SCHEDULE "A"

List of Authorities

1. *Pimiskern v. Brophey*, 2013 ONSC 572
2. *Simmonds v. Simmonds*, 2013 ONCA 479

TAB B

SCHEDULE "B"

Applicable Statutes / Regulations

Courts of Justice Act, R.S.O. 1990, c. C.43

Court of Appeal jurisdiction

6. (1) An appeal lies to the Court of Appeal from,
- (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
 - (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;
 - (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court.

Divisional Court jurisdiction

19. (1) An appeal lies to the Divisional Court from,
- (a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);
 - (b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;
 - (c) a final order of a master or case management master.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

MOTION FOR LEAVE TO APPEAL

Leave to Appeal from Interlocutory Order of a Judge

62.02 (1) Leave to appeal to the Divisional Court under clause 19 (1) (b) of the *Courts of Justice Act* shall be obtained from a judge other than the judge who made the interlocutory order.

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BRANDON MOYSE
(Motion to Quash Appeal)**

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